(H)

No. 96-203

In The

Supreme Court of the United States

October Term, 1996

JOYCE B. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED

1. Is reversal of a perjury conviction required where the trial judge, not the jury, decides the essential element of materiality?

2. In what manner is *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), to be applied to cases then on direct appeal in circuits where a *Gaudin*-type objection would have been frivolous at the time of trial?

3. Does *Sullivan v. Louisiana*, 508 U.S. 275 (1993), limit the holding of *United States v. Olano*, 507 U.S. 725 (1993)?

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The opinion of the Court of Appeals is unreported, (Jt. App. 84-88), but the judgment of affirmance without published opinion is noted at 82 F.3d 429 (table).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on March 19, 1996. The Petition for Rehearing was denied June 11, 1996, (Pet. App. 10a-11a), and the Petition for Writ of Certiorari was filed on August 5, 1996. Certiorari was granted on November 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of Article III and of the Fifth and Sixth Amendments to the Constitution of the United States. Article III, Section 2, Clause 3 provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

The Fifth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

STATEMENT OF THE CASE

On March 19, 1993, the petitioner was served with a subpoena to testify before a United States grand jury. Jt. App. 59-60. The grand jury was investigating allegations that an individual named Earl Fields was involved in unlawful cocaine and marijuana transactions and was inquiring as to the disposition of cash proceeds of Fields' unlawful activities. Jt. App. 59-62. On March 25, 1993, the petitioner appeared before the grand jury. Jt. App. 14-15.

The petitioner, Joyce B. Johnson, at the time was employed as recruitment supervisor for a seven-county district by a State of Florida social services agency for which she had worked for 26 years. Jt. App. 17; Tr. (sentencing) 70. Ms. Johnson has two children, including a teenaged daughter of Mr. Fields'. Jt. App. 17, 38-39, 42-44.

During her appearance before the grand jury, the petitioner was questioned about residential property where she lived on Moore Avenue in Jacksonville, Florida. Jt. App. 17, 21-22. Ms. Johnson bought the property in 1991 and subsequently improved the house on the property. Jt. App. 22. Ms. Johnson told the grand jury that the funds used to improve the house were given to her and her mother "back in probably '85, '86" by Gerald Talcott, a Canadian whose wallet her mother had found

and returned and who subsequently corresponded with Ms. Johnson's mother and provided financial assistance to Ms. Johnson, including to fund her college education. Jt. App. 22-24. Ms. Johnson told the grand jury that she was not sure how much money Talcott had given to her and her mother during the mid-1980s; she approximated the amount to have been between about $80,000.00 and $120,000.00, although she added that she was "not even sure" about the amount. Jt. App. 24-25. After Ms. Johnson's mother died in 1990 of cancer, Ms. Johnson became the beneficiary of the money given by Mr. Talcott, she told the grand jury. Jt. App. 27-28.

Ms. Johnson also told the grand jury that she assembled funds for the purchase of the Moore Avenue property from various sources, including by assuming a mortgage, withdrawing funds from savings accounts, proceeds from a personal injury recovery and from Mr. Fields. Jt. App. 32-38. She acknowledged to the grand jury that she thought about $27,000.00 of the funds toward the down payment for purchase of the property came from Fields. Jt. App. 39, 48-49. Ms. Johnson was asked a number of other questions during her grand jury appearance, (Jt. App. 14-57), including what, if anything, she knew about what Fields did to earn a living. Jt. App. 47-48.

More than one year later, on March 29, 1994, Ms. Johnson was indicted on a single count of perjury under 18 U.S.C. §1623 on the basis of her statements before the grand jury regarding funding for the improvements to the Moore Avenue property. Jt. App. 5-13. The indictment included certain excerpts of Ms. Johnson's statements before the grand jury, with emphasis supplied on the face of the indictment as to which statements were alleged to

have been knowingly and willfully false and material. Jt. App. 6. The statements alleged in the indictment to have been false and material were:

> The monies that I put into it [improvements] was monies that was given to my mom and me back in probably '85, '86. . . .
>
> * * *
>
> It was given to me by the same man that has already paid my four years' tuition to college. . . .
>
> * * *
>
> Well, see, I'm not really sure exactly how much it was because it was given to us – it was given to us in a box and it was basically for my mom, for her and her livelihood, because he was talking about how hard she had had it, how hard she had worked, and the fact that he just wanted her to be sure she did all right.
>
> And, like I said, if I said to you exactly how much it was, I would be lying to you. . . .
>
> * * *
>
> Approximately maybe from $80-$120,000 maybe. I'm not even sure.
>
> Q: That was back in '85 or '86?
>
> A: Yes . . .
>
> * * *
>
> Q: Your mother was still living in Baldwin when she got the money?
>
> A: Yes. . . .

> * * *
>
> Q: So, this money was given to her you said '85, '86?
>
> A: Yes. . . .
>
> * * *
>
> I just kept it in a closet like my mom did. . . .
>
> * * *
>
> $80 – or more. . . .
>
> * * *
>
> Q: You said you are not sure how much those improvements cost you?
>
> A: No, but it cost all of the monies that my mother left me. That was – all of that was used. So I'd say, and I'm only guessing, I'd say roughly the $80-to $120. . . .

Jt. App. 7, 9-12. Ms. Johnson was not charged with having testified falsely as to any other statements she made during her almost one-hour grand jury appearance. Jt. App. 5-13, 14, 57. She was not charged with making any false statement regarding the purchase of the Moore Avenue property. Nor was she charged with any other count or offense. The government presented no direct evidence at trial that Ms. Johnson did not receive, have or use money from Mr. Talcott or that any money provided by Mr. Fields was used to improve the Moore Avenue property.

At trial in December, 1994, both the Government and the petitioner proposed use of Instruction 43, relating to 18 U.S.C. §1623, of the Eleventh Circuit *Pattern Jury*

Instructions, Criminal Cases.[1] Jt. App. 67-68, 69-70. The district court followed the Eleventh Circuit's pattern. Jt. App. 71-73. In pertinent part, following the Eleventh Circuit pattern instruction, the district court instructed the jury:

> The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:
>
> First, that the testimony was given while the defendant was under oath as a witness before a grand jury of this court, as charged.
>
> Second, that such testimony was false in one or more of the ways charged, concerning some material matter in the grand jury proceeding.
>
> And, third, that such false testimony was knowingly and willfully given by the defendant, as charged.
>
> * * *
>
> *The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned, but, rather, it is a question for the Court to decide. You are instructed that the questions asked of the defendant, as alleged, constituted material matters in the grand jury proceedings referred to in the indictment.*

Jt. App. 72 (emphasis added). The district court's instructions, withholding the element of materiality from the jury and directing the jury that the Government had

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[1] Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions, Criminal Cases* 160-161 (1985).

established materiality, conformed with clearly established circuit authority, as well as the circuit's approved pattern instruction. *See e.g., United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States v. Dudley*, 581 F.2d 1193, 1196 n.2 (5th Cir. 1978);[2] *United States v. Damato*, 554 F.2d 1371, 1373 (5th Cir. 1977); *United States v. Edmondson*, 410 F.2d 670, 673 n.3 (5th Cir.), *cert. denied*, 396 U.S. 966 (1969); *Brooks v. United States*, 253 F.2d 362, 364 (5th Cir.), *cert. denied*, 357 U.S. 927 (1958); *Blackmon v. United States*, 108 F.2d 572, 574 (5th Cir. 1940).

Earlier, while ruling on a defense motion for judgment of acquittal on December 7, 1994, the district court stated:

> With respect to this particular offense, there are only three essential elements that the court needs to consider and that the jury would have to consider in this case *because materiality is one that I have to do on my own. . . .*

Jt. App. 64 (emphasis added). The court continued:

> With respect to the question of materiality in the second element, that is something for the court to determine, and I'll make a factual finding and a legal finding at this juncture. The testimony of the foreman of the grand jury, in [sic] the indictment itself, in the ways and means portion of paragraph (a) says that what they were investigating at the time was alleged distribution of cocaine and marijuana by Mr. Fields and the

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[2] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

> disposition of the money which was the proceeds of that business, including the possible concealment of the proceeds as investments in real estate. And with respect to monies that Mr. Fields may have given to Ms. Johnson to either purchase the home or to reconstruct the home, I conclude would be within the purview of information that the grand jury may have been looking at in order to continue their investigation or conduct their investigation on Mr. Fields.

Jt. App. 65-66.

The district court did not indicate explicitly whether it applied a standard of proof beyond a reasonable doubt but stated that materiality had been established because the petitioner's testimony "would be within the purview of information that the grand jury *may* have been looking at. . . . " Jt. App. 66 (emphasis added). Following a jury verdict of guilty (as to the elements submitted to the jury), the petitioner was sentenced on March 31, 1995, to a term of 30 months' imprisonment and 3 years' supervised release, and was fined $30,000.00. Jt. App. 75-83.

At the time of Ms. Johnson's trial, almost every circuit had held that the determination of materiality in a perjury case was an issue of law for decision by the trial judge. *See, United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting), *aff'd.*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). However, after trial and during the pendency of direct appeal in the court of appeals, the Court overruled these precedents in *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Jt. App. 86-87.

SUMMARY OF THE ARGUMENT

The constitutional right to a jury determination of all elements of a charged crime dictates reversal of the court of appeals in this case because the structural nature of the error precludes application of either Fed.R.Cr.P. 52(a) or 52(b). Judges are absolutely prohibited from directing verdicts, in whole or in part, in favor of the prosecution in a criminal case, as occurred below, where the trial judge instructed the jury that the Government had prevailed on an essential element of the offense charged. Application of a plain error or a harmless error analysis under the circumstances presented is unconstitutional.

Plain error analysis cannot be applied where clear, longstanding and binding circuit precedent dictated not only that the trial judge determine materiality but that he also determine materiality in favor of the Government. Plain error inquiry has no application where the trial court's action was not even erroneous at the time of trial under then-existing binding precedent that was conclusively overruled by this Court during the pendency of petitioner's direct appeal. Harmless error analysis cannot apply to review a factual determination that is constitutionally the exclusive domain of the jury, which never made any determination of materiality whatsoever, even indirectly. Because the jury's verdict was constitutionally incomplete, the verdict is a nullity, incapable of review for harmlessness or prejudice.

Moreover, the petitioner suffered actual prejudice affecting her substantial rights as a result of the trial judge instructing the jurors that the government had prevailed as to an essential element, infecting the entire

deliberative process on the elements submitted to the jury. The trial judge further made his finding of materiality under a standard lower than proof beyond a reasonable doubt. For all these reasons, the error at issue is structural and seriously affects the fairness, integrity and public reputation of judicial proceedings by depriving petitioner of her right to a jury decision of guilt beyond a reasonable doubt on all elements of the charged offense. Reversal is compelled by decisions of this Court and the history of the right to trial by jury. Accordingly, the judgment of the court of appeals should be reversed.

ARGUMENT

The petitioner was accused of perjury under 18 U.S.C. §1623, which penalizes knowingly making "any false *material* declaration" while under oath before a United States grand jury. 18 U.S.C. §1623(a) (emphasis added). Materiality is an explicit element of §1623. The trial judge below determined that the Government had established materiality, under a standard lower than beyond a reasonable doubt, and informed the jury of his finding. Jt. App. 65-66, 72. The determination of the element of materiality, however, must be made by the jury, as with all other essential elements of a criminal charge, beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. ___, ___, 115 S.Ct. 2310, ___, 132 L.Ed.2d 444, 458 (1995) (18 U.S.C. §1001 case). *Gaudin* requires submission of materiality to the jury in a §1623 prosecution. *Porat v. United States*, ___ U.S. ___, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995); *United States v. Keys*, 95 F.3d 874, 878 (9th Cir. 1996) (en banc). "[T]he Fifth and Sixth Amendments

require conviction by a jury of *all* elements of the crime." *Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 455 (emphasis in original).

The petitioner has never been convicted by a jury on all elements of the perjury charge and has not surrendered her right to a complete jury verdict. She has been denied her unequivocal right to a jury determination of whether the Government proved each element of perjury beyond a reasonable doubt. She further suffered extreme prejudice by the trial court having directed a verdict to the jury, infecting the entire deliberative process. Accordingly, the judgment of the court of appeals should be reversed.

I.

THE FUNDAMENTAL AND STRUCTURAL NATURE OF THE RIGHT TO TRIAL BY JURY UNDER A REASONABLE DOUBT STANDARD IS ESTABLISHED BY THE HISTORY OF THE RIGHT, AND DEPRIVATION OF THE RIGHT REQUIRES REVERSAL.

This case concerns the right to trial by jury in a criminal case, which dates at least to Athenian law in the fourth and fifth centuries, B.C. K. Freeman, *The Murder of Herodes and Other Trials from the Athenian Law Courts* 17-18 (1946); B. barrett, *The Code Napoleon* xcv (1811).[3] This right was introduced in England after the Norman Conquest of 1066. J. Dillon, *The Laws and Jurisprudence of England and America* 121 n.3 (1894). The right to trial by jury, and its

[3] The trial judge in this case recognized the ancient origins of the right to jury trials in criminal cases and described the right's history and importance to the venire at the beginning of the petitioner's trial. 1 Tr. 3-6.

interaction with principles of due process of law, was codified in 1215 by the Magna Charta.[4] *See Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1856) (constitutional due process standard carries same meaning as "by the law of the land" in Magna Charta).

The right of an accused to trial by jury is "the grand bulwark of his liberties." 4 W. Blackstone, *Commentaries on the Law of England* 342 (1769). The jury is a "barrier . . . between the liberties of the people, and the prerogative of the crown." *Id.* Blackstone warned that "inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." *Id.* at 344.

The right to trial by jury was so paramount that the only codified law in the Plymouth colony for its first five years read: "That all criminal facts and also all manner of trespasses and debts between man and man shall be tried by the verdict of twelve honest men, to be impanelled by authority in form of a jury upon their oath." J. Proffatt, *A Treatise on Trial by Jury* 121-22 (1877), *citing* 1 *Palfrey's New England* 340. When the Massachusetts Body of Liberties was adopted in 1641, it also secured the rights to due

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[4] "No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him, except by lawful judgment of his peers or by the law of the land." Magna Charta, Chapter 39. This right was supplemented or clarified by parliamentary enactment: "[N]o Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor put to Death, without being brought in answer by due Process of Law." 28 Edw. III, c3 (1354).

process and trial by jury and mentioned the jury trial right in six different sections because the rights to trial by jury and due process of law were being restricted by the English crown. E. Morgan, *The Puritan Dilemma* 170 (1958); D. Bodenhamer, *Fair Trial Rights of the Accused in American History* 16 (1992). Previously, the people of the colony "thought their condition very unsafe while so much power rested in the discretion of magistrates." Morgan, *supra*, at 15.

Five hundred years following Magna Charta, the English crown had restricted the right to trial by jury in the American colonies, propelling the colonies toward independence and unqualified protection of the right in the Constitution. Limitation of the jury was a critical feature at the trial of John Peter Zenger for seditious libel in 1735 and was subject to vigorous debate between the court and Zenger's counsel.

At the Zenger trial, the court ruled that the jury was restricted to determination by special verdict of whether Zenger had printed and published the papers at issue, and that the court would decide whether the matter published was libelous. L. Rutherfurd, *John Peter Zenger: His Press, His Trial* 217 (1904) (reprinting first edition of trial). As Mr. Zenger's counsel, Andrew Hamilton, argued in 1735, in pertinent part: "This leaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless (to say no worse) in many cases. . . . " *Id.* In *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the Court unequivocally resolved the question argued at Zenger's

trial in favor of a defendant's right to a general jury verdict beyond a reasonable doubt on all elements of a charged offense.

The First Continental Congress in 1774 described the right to trial by jury in paramount terms as "the great and inestimable privilege of [citizens] being tried by their peers of the vicinage." M. Bloomstein, *Verdict: The Jury System* 25 (rev. ed. 1972). The erosion of the right to trial by jury in fact was among the evils of the English crown that compelled the American colonies to revolution and independence in 1776.

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:. . . . *For depriving us in many cases, of the benefits of trial by jury*. . . .

Declaration of Independence (1776) (emphasis added).

In the same year, the Virginia Declaration of Rights proclaimed the right recognized in Magna Charta to due process of law and trial by jury.[5] Even before the adoption of the Bill of Rights, the right to trial by jury in criminal cases was unqualifiedly a fundamental constitutional requirement. U.S. Const. art. III, §2, cl. 3 ("The Trial

[5] Virginia Declaration of Rights, Sec. 8 (1776) ("That in all capital or criminal prosecutions . . . that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.").

of all Crimes, except in Cases of Impeachment, shall be by Jury. . . . "). This unqualified right was strengthened and reemphasized by the due process and jury trial clauses of the Fifth and Sixth Amendments.

The Court has described the right to trial by jury in terms that leave no doubt as to the paramount, fundamental and structural nature of the right.

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect *a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.* Fear of unchecked power, so typical of our State and Federal governments in other respects, found expression in the criminal law in this instance upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968) (emphasis added). In other words, this right is utterly stripped from a criminal defendant when a trial court, an appellate court or indeed even this Court considers, in the absence of a jury verdict, whether guilt has been

proved beyond a reasonable doubt where no jury has rendered a verdict of guilt on all elements of a charged offense. "Twelve good and lawful men are better judges of disputed fact than twelve learned judges." J. Dillon, *The Laws and Jurisprudence of England and America* 168 (1894).

> [W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Duncan, 391 U.S. at 157. Judicial speculation as to the weight of evidence on one or more elements never decided by a jury violates Article III, the Sixth Amendment and at times the Fifth Amendment. "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 325 U.S. 607, 614 (1946).

The exceptions to the fundamental right to trial by jury in criminal cases are exceedingly narrow. Unless the charged crime is merely a petty offense, *see, e.g., Schick v. United States*, 195 U.S. 65, 68-72 (1904), the right to trial by jury in a criminal case can be abridged only by an overt, clear, informed and voluntary waiver. *See, e.g., Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942); Fed.R.Crim.P. 23(a).

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the

> court must be had, in addition to the express and intelligent consent of the defendant.

Patton v. United States, 281 U.S. 276, 312 (1930). This fundamental right cannot be surrendered by silence, accident or judicial anomaly.[6]

Even if the evidence appears overwhelming, no judge may constitutionally direct a verdict of guilty in a criminal case, even in part. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947); *Sparf & Hanson v. United States*, 156 U.S. 51, 105 (1895). The absolute right of a defendant to insist upon a jury determination of guilt, even in the face of the strongest evidence, *Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring), certainly renders the right so fundamental as to be capable of surrender only by explicit, knowing and voluntary waiver.

The error presented in this case is even more structural and egregious than the deficient reasonable doubt instruction in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). While concurring that Sullivan's conviction should be reversed, and comparing the *Sullivan* error to that in *Rose v. Clark*, 478 U.S. 570 (1986), the Chief Justice observed that the *Sullivan* and *Rose* errors seemed less egregious than the error in the present case. "[N]either error [in

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[6] The right was considered by many so fundamental, and also so critical to public concern, as to be incapable of waiver. J. Proffatt, *A Treatise on Trial by Jury* 157 (1877); *see, Adams*, 317 U.S. at 281-286 (Douglas, J., dissenting) (questioning whether jury trial can be waived in criminal case and arguing for limitations on ability to waive jury).

Sullivan or *Rose*] removed an element of the offense from the jury's consideration. . . . " *Sullivan*, 508 U.S. at 283 (Rehnquist, C.J., concurring). In contrast, an essential element of the offense was removed from the jury's consideration in this case. Even more egregiously and prejudicially to the petitioner, the trial judge specifically informed the jury that the petitioner was guilty of an essential element, Jt. App. 72, a horrendous violation of the constitutional prohibition against directed verdicts of guilt in criminal cases. *Martin Linen*, 430 U.S. at 573; *United Brotherhood of Carpenters*, 330 U.S. at 408.

The jurisprudential underpinnings of this conclusion are unmistakably clear.

> No man should be deprived of his life under the forms of law unless *the jurors* who try him are able, upon *their* consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

In re Winship, 397 U.S. 358, 363 (1970), *quoting Davis v. United States*, 160 U.S. 469, 493 (1895) (emphasis added). The ultimate burden at trial is upon the government to "convince the trier of all the essential elements of guilt." *In re Winship*, 397 U.S. at 361 (citations and internal quotations omitted).

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the

> dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Bollenbach v. United States, 326 U.S. 607, 615 (1946). The court of appeals violated this principle by "substitut[ing] the belief of appellate judges . . . for ascertainment of guilt by a jury," *id.*, by concluding that "overwhelming" or "substantial" evidence of the materiality of the petitioner's statements before the grand jury warranted affirmance of her conviction. Jt. App. 88. The decision of the court of appeals directly contravenes clear holdings of this Court. *See, e.g., Martin Linen*, 430 U.S. at 573; *Duncan*, 391 U.S. at 155-156; *United Brotherhood of Carpenters*, 330 U.S. at 408. Accordingly, the judgment of the court of appeals should be reversed.

II.

THE *GAUDIN* ERROR IN THIS CASE IS STRUCTURAL, PRECLUDING REVIEW FOR HARMLESSNESS OR PREJUDICE UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 52.

Under the circumstances presented, review in this case may only be for reversible error, which requires reversal of Ms. Johnson's conviction. Review under a plain error or harmless error analysis under Fed.R.Cr.P. 52 is unconstitutional absent a record that shows that the jury's verdict actually rested on a jury determination of the element not only omitted from the jury's consideration but further upon which the jury was conclusively instructed by the trial court that the Government had prevailed. "[T]he Court has held it irrelevant in analyzing

a mandatory presumption, but not in analyzing a permissive one, that there is ample evidence in the record other than the presumption to support a conviction." *County Court of Ulster County v. Allen*, 442 U.S. 140, 159-160 (1979) (citations omitted). Appellate evaluation of the weight of the factual evidence presented at trial violates due process requirements of the Fifth Amendment where the jury "is forced to abide by the presumption and may not reject it based on an independent evaluation of the particular facts presented by the State." *Id.* at 159 & n.17. The due process violation is even more extreme where, as in this case, the jury is given a partial directed verdict, an instruction more forceful than most presumptions because of its conclusiveness.

Furthermore, where the jury is told by the court that the Government has prevailed on an essential element of the charged offense, there clearly exists at least a "reasonable possibility" that the directed verdict of the trial judge "might have contributed to the verdict" reached thereafter as to the elements actually submitted to the jury. *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (citations and internal quotations omitted). The jurors in the petitioner's trial clearly were subject to the influence of the trial court having directed them that the government had prevailed in part. "[T]he wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986). The jury's deliberations were subject to having been influenced by the great weight of the trial judge instructing the jurors that the Government already had won a partial victory over the petitioner even prior to the jury beginning its deliberations. This partial directed verdict in a criminal case toppled one of the structural elements of

the "framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Errors of the magnitude that occurred in the present case are "so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The rights of which the petitioner has been deprived are "safeguards essential to liberty in a government dedicated to justice under law," commanding reversal. *Cole v. Arkansas*, 333 U.S. 196, 202 (1948).

The decision and dictum in *Sinclair v. United States*, 279 U.S. 263, 298 (1929), the progeny of which withdrew the element of materiality in a perjury case from decision by the jury, not only constitutes an anomaly in the jurisprudence of the right to trial by jury but now clearly has been repudiated and overruled because of the importance of the right to trial by jury. *United States v. Gaudin*, 515 U.S. ___, ___, 115 S.Ct. ___, ___, 132 L.Ed.2d 444, 456-457 (1995).

> [I]t is precisely *historical practice* that we have relied on in concluding that the jury must find all the elements. The existence of a unique historical exception to this principle – and an *exception that reduces the power of the jury precisely when it is most important, i.e., in a prosecution not for harming another individual, but offending against the government itself* – would be so extraordinary that the evidence for it would have to be convincing indeed. It is not so.

Id. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453 (emphasis added). That all elements of a criminal accusation must be determined by a jury is flatly required by Article III and the Fifth and Sixth Amendments. "The core

meaning of the constitutional guarantees is unambiguous." *Id.* at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 455.

Furthermore, where a fundamental, core constitutional right conflicts with an inferior provision of law, e.g., statute, rule or regulation, the courts of the United States are bound by the Constitution. Hamilton, *The Federalist*, No. 78 (1788) (judges "ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental;" rules of construction and conduct for courts are inferior to the Constitution). In other words, rules of procedure must be subordinate to conflicting constitutional mandates.

The principle that Hamilton enunciated in *The Federalist*, No. 78, that the Constitution is controlling over contradictory statutes and rules, further demonstrates the error of any conclusion that Rule 52(b) is the "sole source" of appellate authority to review errors not subject to timely objection at trial. *See, e.g., United States v. Jones*, 21 F.3d 165, 172 (7th Cir. 1994). On the contrary, the principle that certain circumstances warrant correction of trial errors even in the absence of objection at trial has a long history in American jurisprudence, predating enactment of the Federal Rules of Criminal Procedure. *See, e.g., Wiborg v. United States*, 163 U.S. 632, 658 (1896); *United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts in the public interest may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.") (citations omitted).

In fact, the function of Rule 52(a) is to convey authority to the courts to disregard errors that do not affect substantial rights; clearly, the errors in this case affect substantial rights and appellate harmless error review violates the right to trial by jury. *See, Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (constitutionally defective reasonable doubt instruction cannot be harmless). Likewise, the actual function of Rule 52(b) is to give discretion to correct unpreserved errors affecting substantial rights where a defendant is innocent or the error has a serious effect on the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 736-737 (1993). However, where either actual innocence exists, or where an error seriously and detrimentally affects the fairness, integrity or public reputation of a judicial proceeding, an appellate court should always correct such an error. The Court recognized in *Olano* that certain errors require reversal without a showing of prejudice. *Id.* at 735-737.

As a result, Rule 52 is a procedural device that provides discretion to the courts under certain circumstances. However, as noted in *Olano*, 507 U.S. at 735, a "special category" of errors require correction; this "special category" clearly encompasses structural error. Where error is structural, the error is "thus not amenable to analysis under Fed.R.Cr.P. 52." *United States v. Wiles*, ___ F.3d ___, ___ 1996 W.L. 707539, *16 (10th Cir. Dec. 10, 1996) (en banc). Where Rule 52 does not apply, neither does "the discretion [appellate courts] possess thereunder." *Id.* Accordingly, the error in this case requires reversal.

Waiver of a right is the "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (citations and internal quotations omitted). In light of

more than a half-century of judicial authority withholding materiality determinations from the jury, the petitioner cannot be said even to have known at the time of trial that she had the right to jury determination of the element. She clearly did not waive that right.

> Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntarily, all depend on the right at stake.

Id. at 733 (citations omitted). As held in *Patton* and *Adams*, *supra*, waiver of a jury trial in a criminal case at the very least must be express, affirmative, informed and voluntary, and the right cannot be waived by silence. Waiver surely cannot be found in a silent record.

Additionally, of great fundamental importance in this case, materiality long has been recognized at common law as an essential element of perjury offenses. "Sir Edward Coke wrote in 1680 that perjury is a crime committed by one 'who sweareth absolutely, and falsely in a manner *material* to the issue.' 3 E. Coke, Institutes 164 (6th ed. 1680) (emphasis added). Otherwise, as Blackstone stated, 'if it only be in some trifling collateral circumstance, to which no regard is paid, it is not penal.' 4 W. Blackstone, *Commentaries* *137." *United States v. Williams*, 12 F.3d 452, 456 n.8 (5th Cir. 1994). Because jury determination of each element of the offense is a fundamental right; because materiality is an essential element of perjury; because the right to a complete jury verdict is a structural guarantee that undergirds the entire trial process; and because even partial directed verdicts are

unconstitutional and actually prejudicial, the deprivation of the right compels reversal in this case.

Although numerous panel decisions have reached conflicting, or at least inconsistent, results in considering the issues presented in this case (*See* Pet. at 8-11), two circuits now have considered the issues en banc, and both conclude that reversal of a conviction is required under the circumstances presented in this case. *United States v. Wiles*, ___ F.3d ___, 1996 W.L. 707539 (10th Cir. Dec. 10, 1996) (en banc); *United States v. Keys*, 95 F.3d 874 (9th Cir. 1996) (en banc). Both *Wiles* and *Keys* present compelling analyses demonstrating, first, that Fed.R.Cr.P. 52(b) cannot be applied to the error presented and, second, that the error cannot be found harmless.

In *Keys*, the court of appeals concluded that holding a criminal defendant to the contemporaneous objection requirements of Fed.R.Cr.P. 30 and 52, in light of a clear change in the law following trial, "would be unconscionable." *Keys*, 95 F.3d at 879. Where the *Gaudin* error was not even error at all at the time of trial because of a "solid wall" of binding authority, a defendant cannot be deemed to have forfeited, invited or waived the issue at stake. *Id.*, *citing*, *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994). "We address on appeal such a supervening change in the law as 'error' but to process it in *Olano* 'forfeited error' (or 'invited error') terms is manifestly wrong." *Keys*, 95 F.3d at 879.[7] The mandate of *Griffith v. Kentucky*, 479 U.S.

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[7] The Government gratuitously argues in this case that the petitioner should be burdened with a Rule 52(b) standard of review for *Gaudin* error because she failed to object at trial on an issue that only after trial became legally cognizable, and that

314, 323 (1987), to apply new rules in cases not final, is inconsistent with the discretionary standard of Rule 52(b). *Keys*, 95 F.3d at 879. Further, where the record fails to establish that the jury found materiality, the error cannot be reviewed for harmlessness under Rule 52(a). *Id.* at 881. "Accordingly, because the record demonstrates that the jury did not determine the materiality of the alleged false declaration, the judgment of conviction is defective no matter how strong the evidence of guilt may be." *Id.* at 882.

In this case, the solid wall of binding authority holding that judges decide the materiality issue was almost fifty-five years old in the Eleventh and former Fifth circuits at the time of petitioner's trial. *See, e.g., United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1993); *United States v. Thompson*, 637 F.2d 267, 268 (5th Cir. 1981);[8] *United States v. Dudley*, 581 F.2d 1193, 1196 n.2 (5th Cir. 1978); *United States v. Damato*, 554 F.2d 1371, 1373 (5th Cir.

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consideration of the weight of the evidence compels affirmance of the petitioner's conviction. Brief for the United States (On Petition for Writ of Certiorari) at 4. However, the Government argues duplicitously elsewhere in this Court that it should not be held to any heightened standard of review where the *Government* was the party that failed to raise an issue related to *Gaudin* prior to *Gaudin*. Reply Brief for the United States at 6-8, *United States v. Wells*, No. 95-1228. The Government's suggestion that a defendant must be penalized on appeal, but not the Government, for failing to have raised at trial an issue that only became legally founded following trial is untenable, unfair, and violative of due process.

[8] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

1977); *United States v. Edmondson*, 410 F.2d 670, 673 n.3 (5th Cir.), *cert. denied*, 396 U.S. 966 (1969); *Brooks v. United States*, 253 F.2d 362, 364 (5th Cir.), *cert. denied*, 357 U.S. 927 (1958); *Blackmon v. United States*, 108 F.2d 572, 574 (5th Cir. 1940). Furthermore, circuit law was equally clear that the jury should be directed by the trial judge that the Government had established the materiality element. *Damato*, 554 F.2d at 1373; *Barnes v. United States*, 378 F.2d 646, 650 (5th Cir. 1967), *cert. denied*, 390 U.S. 972 (1968); *Blackmon*, 108 F.2d at 574; *see*, Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions, Criminal Cases* 160-161 (1985); 2 Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* 575-598 (1990 ed). The petitioner should not be penalized for failing to raise an objection that would have been utterly frivolous at the time of her trial.

Additionally, the petitioner in this case suffered the actual prejudice of having the trial court affirmatively direct a partial verdict to the jury. Jt. App. 72. The trial court told the jury that Ms. Johnson was guilty of one of the four elements of perjury. The trial court further reached its directed verdict without indicating the standard of proof to which the Government was held with respect to materiality, but indicating that the standard employed was exceedingly low. Jt. App. 65-66. In *Keys*, materiality was not even mentioned to the jury, and the jury never was advised that a partial directed verdict had occurred. *Keys*, 95 F.3d at 877. Accordingly, the Article III, Fifth Amendment and Sixth Amendment deprivations suffered by the petitioner are even more acute than the like deprivations that warranted reversal by the en banc Ninth Circuit.

Even more recently, the Tenth Circuit has rendered its en banc decision in *United States v. Wiles*, ___ F.3d ___, 1996 W.L. 707539 (10th Cir. Dec. 10, 1996). In *Wiles*, the defendants did not object to the district court determining the issue of materiality rather than submitting the element to the jury, although the defendants did object to the district court's conclusion that the government had met its burden of demonstrating materiality by the production of "some evidence." *Id.* at ___, 1996 W.L. 707539 at *9. At the time of trial in *Wiles*, Tenth Circuit precedent not only withheld the determination of materiality from the jury in 18 U.S.C. §1001 cases but also held that materiality "was a question of law for the court *'with an attendant reduction of the government's burden of proof on this issue.'* " *Id.* at ___, 1996 W.L. 707539 at *9 (emphasis added), *quoting, United States v. Daily*, 921 F.2d 994, 1003 n.9, 1004 (10th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991). During the pendency of the appeals decided in *Wiles*, the Court decided *Gaudin*, and so the en banc Tenth Circuit confronted the same circumstances as presented here by the petitioner. *Wiles*, ___ F.3d at ___, 1996 W.L. 707539 at *8-*16. The court concluded that Wiles and another defendant

> did not intentionally relinquish or abandon their right to have a jury determine beyond a reasonable doubt all elements of the §1001 charges. At the time of their trials, they were not aware of this right. *See*, Fed.R.Cr.P. 51 ('if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.')."

Id. at ___, 1996 W.L. 707539 at *10. The Tenth Circuit observed that, whether the inquiry is for plain error or

harmless error under Fed.R.Cr.P. 52, the court must be able to determine whether the error affected the substantial rights of the defendant. *Id.* at ___, 1996 W.L. 707539 at *10. To make any such determination, a reviewing court "must be able to evaluate the effect of the error on the reliability of the jury verdict." *Id.* at ___, 1996 W.L. 707539 at *10, *citing, Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

However, because the consequences of the error at issue are "unquantifiable and indeterminate," the error is structural. *Wiles*, F.3d at ___, 1996 W.L. 707539 at *11, *citing, Sullivan*, 508 U.S. at 281-282. Structural error utterly defies analysis under either a harmless error or a plain error inquiry. *Id.* at ___, 1996 W.L. 707539 at *13. Furthermore, "due to the nature of structural error, whether a defendant objects (as required for Rule 52(a) analysis) or fails to object (as required for Rule 52(b) analysis) to such error at trial is simply irrelevant." *Id.* at ___, 1996 W.L. 707539 at *13. The only inquiry under which reversal can be avoided is an inquiry able to determine that the jury in some other manner necessarily found the otherwise omitted element.

> A Rule 52 standard that looks at the question of whether the jury necessarily found the element to be satisfied based upon underlying findings of fact, rather than what a hypothetical jury might have found, places the determination of the element in the 'right entity' – the jury. In other words, if the element-specific error did not prevent the jury from rendering a verdict on that element an 'object' remains upon which harmless or plain error scrutiny can operate, and thus the error is not structural.

Id. at ___, 1996 W.L. 707539 at *15 (citation omitted). The Tenth Circuit continued:

> But the essential connection between a presumption and underlying predicate facts is not present where the error consists of the failure to instruct on an element of a crime in its entirety. When an instructional error affects a single element, the proper "object" of focus is the jury's verdict on that element. If, as here, the element-specific error, i.e., the instructional omission, prevents the jury from rendering a verdict on an element entirely, no "object" exists upon which harmless or plain error analysis can operate. To conclude the error was harmless or not plain would be the same as directing a verdict on the element – both would prevent an actual jury verdict on that element. Supreme Court precedent precludes us from "conduct[ing] a subjective inquiry into the juror's minds" in order to uphold a conviction.

Id. at ___, 1996 W.L. 707539 at *15, *quoting, Yates v. Evatt*, 500 U.S. 391, 404 (1991).

> Because the respective juries in the cases before us did not render a verdict, formal or otherwise, against Wiles or Schleibaum on the element of materiality, we hold that the district court's failure to instruct the juries as to the element of materiality under 18 U.S.C. §1001 on count one of the respective indictments is "structural" error and falls within that "special category of forfeited errors" that does not require a showing of prejudice, but rather, *must be* corrected. Because the error is structural, and thus not amenable to analysis under Fed.R.Cr.P. 52 or the discretion we possess thereunder, we vacate Defendants' §1001 convictions under count one of the respective indictments.

Wiles, ___ F.3d at ___, 1996 W.L. 707539 at *16, *citing Olano*, 507 U.S. at 735 (footnote omitted, emphasis in original).

In other words, an error such as that presented in this case is not amenable to analysis under Rule 52(a) or (b), which rules constitute the sole source of appellate discretion to affirm a conviction despite error that affects a defendant's substantial rights. The en banc Tenth Circuit specifically disagreed with decisions of other circuit panels that have concluded that a failure to instruct on an essential element is structural and presumed prejudicial, but then affirmed convictions under the discretionary prong of a plain error analysis because of the weight of the evidence. *Id.* at ___ n.13, 1996 W.L. 707539 at *16 n.13 (citations omitted).[9] "As we have seen, however, structural error requires reversal in every instance because such error 'undermines the structural integrity of the criminal tribunal itself.' " *Id.* at ___ n.13, 1996 W.L. 707539

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[9] *See also*, Edwards, *To Err is Human But Not Always Harmless: When Should Legal Error be Tolerated*, 70 N.Y. U.L.Rev. 1167 (December 1995). Chief Judge Edwards of the District of Columbia Circuit advocates considering whether error influenced the verdict and criticizes judges deciding cases based on their belief of whether an accused is actually guilty. "Just as *Sullivan* and *O'Neal* [*v. McAninch*, ___ U.S. ___, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)] do with the harmless-error doctrine, *Olano* requires that the plain error doctrine not be applied simply on the basis of the reviewing court's own assessment of the defendant's guilt." *Id.* at 1204. *See Weiler v. United States*, 323 U.S. 606, 611 (1945) ("We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.").

at *16 n.13, *quoting*, *Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986).

As in *Wiles*, the error in this case was structural and so requires reversal. Prejudice must be presumed. Moreover, actual prejudice to the petitioner can be shown because the trial judge directed a verdict of guilty to the jury on the materiality element.

Furthermore, the trial judge failed to hold the Government to a standard of guilt beyond a reasonable doubt and may have held the Government to no burden at all. The district court only found that the statements at issue "would be within the purview of information that the grand jury *may* have been looking at. . . . " Jt. App. 66 (emphasis added). *See e.g. United States v. Abroms*, 947 F.2d 1241, 1246-47 (5th Cir. 1991) ("[a]s a question of law, there cannot appropriately be *any* evidentiary or factual burden with respect to the issue of materiality") (internal quotations and citation omitted, emphasis in original); *United States v. Flowers*, 813 F.2d 1320, 1325 (4th Cir. 1987) ("government . . . bears a light burden in proving materiality"); *United States v. Giacalone*, 587 F.2d 5, 6-7 (6th Cir. 1978) (materiality need not be proven beyond reasonable doubt), *cert. denied*, 442 U.S. 940 (1979); *United States v. Martellano*, 675 F.2d 940, 942 (7th Cir. 1982) (same); *United States v. Martinez*, 837 F.2d 900, 902 (9th Cir. 1988) (same).

Clearly, the district court applied an unconstitutional standard, *In re Winship*, 397 U.S. at 375, even lower than a preponderance standard. That due process violation alone requires reversal as structural and actually prejudicial error. The petitioner has never been found guilty beyond a reasonable doubt on all elements of the charged offense. Accordingly, the judgment of the court of appeals should be reversed.

III.

REVERSAL IS COMPELLED EVEN IF PLAIN ERROR STANDARDS OF REVIEW APPLY.

The slippery slope of not permitting determination of all elements of the offense charged by the jury, even where trial counsel has acquiesced, is demonstrated by the instructive opinion in *United States v. Bosch*, 505 F.2d 78 (5th Cir. 1974), which applied Fed.R.Cr.P. 52(b). In *Bosch*, the jury's deliberations on a conspiracy count against the defendant were restricted to a single issue, whether the defendant's statements to government agents were made under immunity, and the jury was instructed to find the defendant guilty unless it found that the defendant had immunity. *Id.* at 79-81. Writing for the court of appeals and applying the Rule 52(b) standard later enunciated in *United States v. Olano*, 507 U.S. 725 (1993), Judge Clark expressed the issue as follows:

> In criminal trials, any encroachment upon the broad right to a jury's general verdict of guilty or not guilty is fraught with danger. In the bright light of appellate hindsight, we can see that what appeared below as an efficacious and unexceptional procedure masked instead the path to error. The special interrogatories which were used to narrow the issues for the jury may have required them to return a verdict of guilty even though they found that all elements of the offense had not been proved. This possibility requires reversal despite the express acquiescence of the court-appointed counsel for the defendant in the defective procedure.

* * *

Whether we think Bosch guilty or innocent is not a proper concern here – that is a jury's function. Indeed, more is at stake in the present appeal than just her substantial rights, though they must weigh heavily in the decisional equation.

In determining whether to notice these errors, a more important consideration is the over-all impact upon the system of criminal justice of allowing a conviction to flow from a jury's verdict which has been limited by judicially fashioned blinders to a single specified fact issue. This procedure is so fraught with danger for the defendant in particular and for the system in general that we review it here despite the fact that the attorney for the defendant did not comply with the salutatory commands of Federal Rules of Criminal Procedure 30. Not only because the errors affect substantial rights, but because they also squarely place the integrity of the judicial process at hazard, they must be reviewed.

* * *

The thrust of our decision today is that this sort of game is not worth the candle.

Id. at 78-79, 81-83 (citations and footnotes omitted).

As in *Bosch*, the petitioner's substantial rights to trial by jury under a standard of proof beyond a reasonable doubt and freedom from a directed verdict in a criminal case were affected structurally and prejudicially, and the gravity of the infringements "squarely place[s] the integrity of the judicial process at hazard." *Id.* at 82. Additionally, Bosch's conviction was reversed even though no post-trial change in the law was at issue, unlike in the

case now presented. Accordingly, the judgment of the court of appeals should be reversed.

This case presents circumstances not reached by the Court's decision in *United States v. Olano*, 507 U.S. 725 (1993). In *Olano*, the Court specifically noted, "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* at 735.

The issue presented in this case, the deprivation of the petitioner's right to a jury verdict on all essential elements of the offense charged, is so structural and fundamental that not only "can" it be corrected regardless of perceived effect on the outcome of the trial below, but it must be corrected. The structural and fundamental nature of the error presented further warrants a presumption of prejudice because the only way in which prejudice or the absence of prejudice possibly could be ascertained is through sheer speculation as to how the trial may have proceeded had the element of materiality been submitted to the jury and the parties permitted to frame their trial strategies accordingly.

The right to a complete verdict by the jury is as basic as the protections deemed too fundamental to be subject to any sort of harmlessness or prejudice inquiry, such as unlawful exclusion from a jury based on race, the right to self-representation at trial and the right to a public trial. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), *citing*, *Vasquez v. Hillery*, 474 U.S. 254 (1986); *McKaskle v. Wiggins*,

465 U.S. 168, 177-178 n.8 (1984); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-578 (1986) (citation omitted). Even if Fed.R.Cr.P. 52(b) has any application under the circumstances of this case, the deprivation of a citizen's right to trial by jury in a criminal case, "the grand bulwark of his liberties," 4 W. Blackstone, *Commentaries on the Law of England* 342 (1769), clearly constitutes an error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," warranting reversal. *Olano*, 507 U.S. at 732, *quoting*, *United States v. Atkinson*, 297 U.S. 157, 160 (1936). The Court has "*never* held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence." *Olano*, 507 U.S. at 736 (emphasis added). Accordingly, particularly with the gravity of the deprivation in this case, the petitioner should not be forced in some way to prove actual innocence for purposes of Rule 52(b) relief.[10]

Additionally, this case may present another issue specifically not reached in *Olano*: "[T]he special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." 507 U.S. at 734. Applicable law was not unclear, however, at the time of petitioner's trial; the law

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[10] The record contains no direct evidence that the petitioner's grand jury testimony was incorrect except as to a clearly immaterial discrepancy as to the year in which her benefactor, Mr. Talcott, died.

was clear that judges decided materiality. Indeed, error that would have been clear at the time of trial in this case in light of a half century of binding circuit precedent would have been submission of the element of materiality to the jury.

This question not reached in *Olano* is answered in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), which established that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." As a result, *Griffith* supplies the answer to the "special case" issue left unaddressed in *Olano*. *See United States v. Wiles*, ___ F.3d ___, 1996 W.L. 707539, *10 (10th Cir. Dec. 10, 1996) (en banc); *see also*, *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994) (burden under Rule 52(b) shifted to prosecution in light of intervening decision changing previously settled law), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995); *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir.) (supervening decision doctrine created to provide defendant the benefit of change in law), *cert. denied*, ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994).

A contrary standard of review in circumstances of a clear change in law that overrules binding precedent at the time of trial would encourage frivolous objections.

> [W]hen faced with a "solid wall of circuit authority" endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that "solid wall" suddenly crumble in the interim and render the instruction defective.

> An exception [to the instruction] would not have produced any results in the trial court. Under these circumstances were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on their settled principles out of hope that those principles will later be overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

United States v. Keys, 95 F.3d 874, 878 (9th Cir. 1996) (en banc), *quoting*, *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc). No distinction exists between a failure to object and the affirmative offering of a solidly settled model instruction by a defendant, *Keys*, 95 F.3d at 879, particularly where the pertinent law in the circuit has been settled for half a century.

Application of the strict Rule 52(b) standard in the circumstances of this case would communicate to defense counsel a clear message that counsel should not rely on settled principles of law and should object to every issue conceivable in case of a post-trial change in the law. *Id.* As the court further noted in *Keys*:

> Without a contemporaneous error, there was nothing to forfeit, to invite, or to waive. As the Second Circuit said in *United States v. Viola*, an attorney "cannot be said to have 'forfeited a right' by not making an objection, [because] at the time of trial no legal right existed."

Keys, 95 F.3d at 879, *quoting*, *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994); *see*, *United States v. Baumgardner*, 85

F.3d 1305, 1308-09 (8th Cir. 1996) (Rule 52(b) inapplicable where clear binding precedent overruled following trial because application of the Rule 52(b) standard would encourage frivolous objections).

The court has enumerated a series of inquiries that must be considered when applying Fed.R.Cr.P. 52(b). There must be (1) error that is (2) "plain" and the error must (3) "affect substantial rights." *United States v. Olano*, 507 U.S. 725, 731 (1993). Discretion to correct such an error should be exercised where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732.

That the issue presented in this petition constitutes error is beyond dispute. *See United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. ___, 132 L.Ed.2d 444 (1995). The petitioner is entitled to the benefit of *Gaudin*, which was rendered during the pendency of her direct appeal, for determination of the plainess or clarity of the error. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The error seriously affects the fairness, integrity and public reputation of judicial proceedings by constituting a deprivation of the petitioner's unqualified and unwaived right to trial by jury, by violating the constitutional prohibition against directed verdicts in criminal cases and by violating the due process principle that each element of a charged offense must be proven beyond a reasonable doubt.

The error further affected the outcome of the proceedings because no jury verdict has been reached on all the elements of the offense charged and because the jury's deliberative process clearly was contaminated by

the district court's instruction that, in effect, the defendant was guilty with respect to one element even prior to the commencement of deliberations. Without question, these deprivations of the petitioner's fundamental, core constitutional rights renders her trial unfair, results in a lack of integrity of the trial and brings the public reputation of judicial proceedings into doubt by subjecting to public question whether judicial anomaly can result in the greatest infringements of the most paramount rights secured for citizens by the Constitution. Accordingly, the judgment of the court of appeals should be reversed.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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